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The Clergyman: His Privileges and Liabilities

*Valentine A. Toth**

THE DOCTRINE OF SEPARATION of church and state does not exclude the civil courts from jurisdiction over many church-related questions. Constitutional guarantees of freedom of religion may not be allowed to lead to anarchy by allowing the church to be independent of state surveillance. On the other hand, the law does not claim that the church purchased its independence at the price of not criticizing the state when morality, ethical government or responsible citizenship are at stake.

While this discussion is couched chiefly in terms of Protestant churches and clergymen, it is equally applicable to Roman Catholic, Jewish, and other religious polities as well, in most respects.

I. Generally

In order to limit the surveillance of the state to the proper fields, and to assure freedom of religion, the law confers privileges upon the churches and the clergy and imposes liabilities upon them also.¹

The courts, for these purposes, categorize the matters in which the law has any concern or contact with churches. Generally the law professes little concern for the doctrines of churches, but it is frequently concerned with their government and with the polities of the denominations.² The courts ordinarily accept jurisdiction when questions of property or civil rights are involved.³ In line with this categorization, in the eyes of the law church organizations possess dual natures.⁴ Public policy assumes that an unincorporated religious association, or a religious society incorporated under the statutes, and a church associated therewith for the observance of sacraments, although indis-

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¹ Stringfellow, *Law, Polity and Reunion*, 20 Ohio St. L. J. 112 (1959); 14 C. J. S. 1117; *Contra*: Wyandotte County v. Wyandotte Presb. Church, 30 Kans. 620, 1 P. 109, 112 (1883).

² *Fiske v. Beatty*, 201 N. Y. S. 441 (1923), 238 N. Y. 598, 144 N. E. 907 (1924).

³ *Casey v. R. Cath. Archbishop of Baltimore*, 217 Md. 595, 143 A. 2d 628 (1958).

⁴ *Harlem Church v. N. Y. Greater Corp. of Seventh Day Adventists*, 260 N. Y. S. 517, 521, 198 N. E. 615 (1932); *Bennet v. LaGrange*, 153 Ga. 428, 112 S. E. 482, 486 (1922).

solubly associated, are separated by a distinct line of demarcation. The corporation is the legal entity which holds the title to the real and personal property. The "church" is the body of communicants gathered in the church membership for the observance of sacraments and for mutual support and edification of piety, morality and religious observances.⁵ Although each of these two bodies, viz: the corporation and the church, may exist within the pale of the other, they are in no respect correlatives.⁶ The objects and interests of one are moral and spiritual; the other deals with things temporal and material.⁷

A religious corporation created by statutes must be regarded as a legal personality, and is in no sense ecclesiastical in its functions. The temporalities of this corporation must be administered, however, within denominational usage, with the contemplation of coexistence of a church in the spiritual sense and a church in the legal sense, working together towards the same beneficial ends.⁸

The courts draw two broad, general conclusions from this dual aspect of churches: (1) Civil courts, when dealing with property and civil rights, attempt to act in harmony with the constitution, confessions of faith and usages of the denominations.⁹ (2) Civil courts afford no remedies for abuses of ecclesiastical authority which do not violate civil or property rights, and controversies over theological questions are within the jurisdiction of ecclesiastical tribunals.¹⁰ The only exception to the second point seems to be the case where ecclesiastical tribunals act in excess of their jurisdictions or powers or in clear violation of the fundamental laws of the church.¹¹

⁵ *Master v. Second Parish of Portland*, 36 F. Supp. 918, 925 (D. C., D. Me., S. D., 1940); 124 F. 2d 622.

⁶ 45 Am. Jur. 727.

⁷ *Petty v. Tooker*, 21 N. Y. 267, 271, 8 N. Y. S. 270, 271 (1860); *Walker Memorial Baptist Church v. Saunders*, 173 (N. Y.) Misc. 455, 457, 17 N. Y. S. 2d 842, 844 (1940); 285 N. Y. 462, 35 N. E. 2d 42 (1941); 45 Am. Jur. 723; *Christian Church v. Summer*, 149 Ala. 145, 43 S. 8 (1907); *Hardin v. Second Baptist Church*, 51 Mich. 137, 16 N. W. 311 (1883); 70 A. L. R. 88; 76 C. J. S. 735; *Oleck, Non-Profit Corporations and Associations* (1956); *Stringfellow, op. cit. supra* n. 1; *Lilly v. Tobein*, 103 Mo. 477, 15 S. W. 618 (1891).

⁸ *Fiske v. Beatty, supra* n. 2; *Westminster Presbyterian Church v. Trustees of Presbytery of N. Y.*, 105 N. Y. 199, 202, 96 N. E. 1134 (1914).

⁹ *Sanders v. Edwards*, 199 Ga. 266, 34 S. E. 2d 167, 168 (1945).

¹⁰ *Shaw v. Harvey*, 103 Ind. App. 280, 7 N. E. 2d 515 (1937).

¹¹ *Stone v. Bogue*, 238 Mo. App. 392, 181 S. W. 2d 187 (1944); *Mason v. Lee*, 96 Miss. 186, 50 S. 625 (1909); *Hatfield v. DeLong*, 156 Ind. 207, 59 N. E. 483 (1901); *Kompier v. Thegza*, 213 Ind. 542, 13 N. E. 2d 229, 231 (1938); *Russian-Serbian Holy Trinity Orth. Church v. Kulik*, 202 Minn. 560, 279 N. W. 364, 369 (1938); *Gibson v. Trustees of Pencader Presb. Church*, 25 Del. Ch. 317, 20 A. 2d 134, 138 (1941); *Fiske v. Beatty, supra* n. 2.

The distinction between the religious corporation and the spiritual church enables the courts to clarify the legal status of the clergyman.¹²

II. The Minister and the Religious Corporation

The religious corporation possesses no powers other than strictly temporal ones, and is managed according to denominational policy. Control of its temporal affairs (in other words, the management of the corporation) is in the hands of the trustees.¹³

If the polity of the denomination does not expressly provide otherwise, the minister, by the mere fact of his appointment, employment or election, does not become a trustee or an officer of the corporation. In *Fiske v. Beatty* the court says:

He is not a corporate officer nor does he administer to the corporate needs of a group of incorporators. He is the advisor, guide and shepherd of a spiritual flock, not the manager of corporate properties.¹⁴

His relation to the corporation is determined by the polity of the denominations. Generally three church polities (in Christian churches) are recognized by the law:

(1) Episcopal: The bishop is the primary governor of the church and guardian of faith and discipline, but has no absolute authority or unrestricted discretion. In the Roman Catholic church the bishop holds title to the property of the church and is often called a *corporation sole*.¹⁵

(2) Presbyterian: In the denominations adhering to this polity the congregations are governed by elders. Neighboring congregations form a church district (Synod or Presbitery). The district is governed by elected lay-members and ministers.

(3) Congregational: In this system each congregation exercises authority in matters of doctrine and discipline.¹⁶ In some states religious corporate statutes clarify the relationship of the minister and the religious corporation in harmony with these polities.¹⁷

¹² *Harlem Church v. Greater N. Y. Corp.*, *supra* n. 4; *Master v. Second Parish of Portland*, *supra* n. 5.

¹³ *Russian-Serbian Holy Trinity Orth. Church v. Kulik*, *supra* n. 11; 76 C. J. S. 776; 45 Am. Jur. 738.

¹⁴ *Fiske v. Beatty*, at p. 447, *supra* n. 2.

¹⁵ *Casey v. R. Cath. Archbishop of Baltimore*, *supra* n. 3.

¹⁶ *Elston v. Wilborn*, 208 Ark. 377, 186 S. W. 2d 662, 663 (1945); *Steward v. Jarriel*, 206 Ga. 855, 59 S. E. 2d 368, 369 (1950).

¹⁷ *N. Y. Relig. Corp. L. (Consol. L. Ch. 52, § 2. 1951)*; *N. J. Stat. Ann. t. 16* (1939); 76 C. J. S. § 40, 796.

Other states arrive at the same result by less detailed statutes or by court decisions.¹⁸ Some denominational polities provide that the minister shall be a trustee or the president of the board of trustees.¹⁹ Other denominations do not have such provisions for the local churches. Even if provisions should be made which confer upon the minister an office in the corporation, this office is incidental to his ministerial capacity.²⁰

Church polities and applicable law in other than Christian churches are too specialized to be treated here. But it should be understood that there are equivalent legal provisions for the other religious faiths such as Judaism, the Moslem church, and so forth.

The minister is not *ex officio* an agent of the religious corporation and has no implied authority to bind it.²¹ In the absence of special authorization he cannot bind the bishop in temporal matters.²² The service rendered by a minister is for religious and not for mercenary ends, but the religious corporation is responsible to take care of his temporal needs, and the contract involved gives pecuniary rights which the law enforces.²³

III. The Office of the Minister and Election of Pastors

The ministry of the church is the ecclesiastical function of the church.²⁴ Since the law generally is not concerned with the ecclesiastical functions of the church, the training, education, licensing and ordination of a minister are purely ecclesiastical matters. A person is accepted as a minister, by the law, if he is duly licensed or ordained by a church. While members of other learned professions are usually not recognized, licensed or accepted by law as professionals without certain educational or legal requirements, the members of the clergy do not have to meet any such standards besides the requirements of the licensing or ordaining denomination. In Ohio and in most of the states the courts license ministers to solemnize marriages if they are "duly ordained" by a church and if they serve a denomination or a congregation in that capacity.²⁵

¹⁸ Rev. Stat. Neb. § 21,801 (1954); Ohio Rev. Code, § 3101.08 (1958).

¹⁹ N. Y. Relig. Corp. L., *supra* n. 17; Fiske v. Beatty, *supra* n. 2.

²⁰ N. Y. Relig. Corp. L., *supra* n. 17.

²¹ C. J. S. § 44, 801; Dalton v. St. Luke's Catholic Church, 27 N. J. 22, 141 A. 2d 273 (1958).

²² C. J. S. § 44, 801.

²³ (As with any contract.)

²⁴ Rector of St. George Church v. Morgan, 152 N. Y. S. 497, 88 Misc. 702 (1915).

²⁵ Ohio Rev. Code, *supra* n. 18; 38 C. J. 1311, n. 93-95.

The New York Religious Corporation Law gives a good illustration of this exclusive power of the church body:

The term "clergy" and the term minister include a duly authorized pastor, rector, priest, rabbi, and a person having authority from or in accordance with, the rules and regulations of the governing ecclesiastical body of the denomination or order, if any, to which the church belongs, or otherwise from the church or synagogue to preside over and direct the spiritual affairs of the church or synagogue.²⁶

A definition given by a Federal Court says, in essence, that a duly "ordained minister" is generally one who followed a prescribed course of study of religious principles, has been consecrated to the service of living and teaching that religion through an ordination ceremony under the auspices of an established church, has been commissioned by that church as its minister in the service of God, and generally is subject to control or discipline by a council of the church.²⁷ Other state statutes and court rulings are essentially in accord with these definitions and are in agreement that the church has the sole right to confer upon a person the attributes of a minister. In consequence, when the courts are to decide whether a person is a minister or not, they look into the rules, practices and standards of the ordaining church body. It was held to be proper for federal authorities to seek the advice of a religious board before deciding whether a person was a member of the clergy or not.²⁸ The polity of certain denominations draws a clear line between the clergy and laity (Roman Catholic, Orthodox, Protestant, Episcopal), but the distinction becomes more difficult when the principle of the universal priesthood prevails, even to the extent that some Protestant church bodies commission lay ministers.²⁹ The line of distinction is almost non-existent where the church maintains that every church member is a minister.³⁰

A duly recognized, licensed or ordained minister becomes the pastor of a congregation if a pastoral relation is created. According to ecclesiastical laws this pastoral relation is created by the appointment, election or employment of the minister.³¹ The

²⁶ N. Y. Relig. Corp. L. *supra* n. 17.

²⁷ *Buttocali v. United States*, 130 F. 2d 172, 174 (5th Cir., 1942).

²⁸ *Eagles v. United States*, 329 U. S. 304 (1946).

²⁹ The Constitution and By-laws of the E. and R. Church, Part IV., 20 (1956).

³⁰ *Gonzales v. United States*, 348 U. S. 407 (1955).

³¹ The Constitution and By-Laws of the E. and R. Church, Part III., 17, 18 (1956); *Franklin v. Hahn*, 275 S. W. 2d 776 (Ky. App., 1955); *Kelly v. McIntire*, 123 N. J. Eq. 351, 197 A. 736, 740 (1938); *Walker Memorial Baptist Church v. Saunders*, *supra* n. 7; N. Y. Relig. Corp. L. *supra* n. 17; N. J. Stat. Ann., *supra* n. 17.

pastoral relation is for religious purposes, and the minister becomes the spiritual leader of the congregation, being expected to serve the spiritual church in accordance with the beliefs, rules and regulations of the higher denomination or of the congregation. The trustees of the religious corporation generally have no control over the calling, settlement, dismissal or removal of the minister.³² If a minister is suspended by denominational authorities, members are entitled to enjoin him from conducting services.³³ In the absence of fraud, collusion or arbitrariness, the suspension of a church pastor by the highest judicatory of the denomination is conclusive enough to prevent him from continuing to occupy the pulpit of the church. If a minister is suspended by denominational authorities, members are entitled to enjoin him from conducting services.³⁴ In the famous *Melish* case, the majority of the members of the Church of the Holy Trinity (Brooklyn, N. Y.) retained as their pastors Dr. John H. Melish and his son the Rev. William H. Melish, against the orders of Bishop James De Wolfe. The controversy between the pastors and the higher ecclesiastical authority arose from alleged pro-communist statements of the pastors. Since freedom of speech, and not property rights, was the main issue of the controversy, the courts did not enforce the bishop's orders, and the United States Supreme Court refused to review the case.³⁵ Even if property rights are involved, courts refuse to take jurisdiction if the minister's change of beliefs was "no clear case of departure" from the standards of the congregation, especially when the minister was backed by the majority of the congregation.³⁶ In congregational type churches, courts recognize the decisions of the majority of the congregation, or the ecclesiastical authority of duly organized committees, when they deal with problems of pastoral relation, where no injury to property or personal rights occurred.³⁷

When personal or civil wrong is committed by the religious corporation against a minister, the civil courts may interfere even if ecclesiastical authority is concerned. In *Whitecar v. Michener* the court held that a man's profession is his property and that the bishop cannot prohibit a priest from following his profession without accusation and opportunity for hearing and trial.³⁸ In

³² *Fiske v. Beatty*, *supra* n. 2; *Mathis v. Holmes*, 134 N. J. Eq. 186, 34 A. 2d 645, 647 (1943); *Freeman*, *Exemptions from Civil Responsibilities*, 20 Ohio St. L. J. 437 (1959).

³³ *Kelly v. McIntire*, *supra* n. 31 at p. 741.

³⁴ *Ibid.*

³⁵ *Pfeffer*, *Church, State and Freedom* (1953).

³⁶ *Gilkey*, *State Intervention in Matters of Religion*, 27 Kan. L. R. 41 (1958).

³⁷ *Ibid.*

³⁸ *Whitecar v. Michener*, 37 N. J. Eq. 6 (1883).

O'Moore v. Driscoll, the plaintiff, a priest, was forced to sign a confession implicating him in crime, forcing him to retire to an institution for the insane and infirm maintained under church jurisdiction. The court answered the question whether these acts were so essentially matters of ecclesiastical discipline as to be irremediable in a court of civil jurisdiction, by ruling that such acts of church superiors might give rise to a cause of action.³⁹

IV. Professional Privileges of the Clergy

In certain circumstances the law protects tradesmen and members of learned professions. This protection grants them some conditional or qualified privileges.⁴⁰ The privilege is generally attached to their trades or professions, and the test of its existence is whether a person was touched by his profession or by his office.⁴¹ While this test is applied rather narrowly when members of other learned professions are concerned, the law offers the clergy a broader protection. In *Chaddock v. Briggs* the Massachusetts high court declares that a clergyman

Is separated from the world by his public ordination, and carries with him constantly, whether in or out of the pulpit, superior obligations to exhibit in his whole deportment the purity of that religion which he professes to teach.⁴²

The Ohio high court, in *Hayner v. Truman*, declares that ministers ought not to be regarded in the eyes of the law as purer or holier than any other men, and are not entitled to protection in any greater degree than others.⁴³ Words spoken of him, however, concerning him in his ministerial duties, his profession, or calling, are actionable per se. The reasoning of the court said:

Because they tend to deprive him of the emoluments which pertain to his profession, and may prevent his obtaining employment, . . . not because his office is higher than that of his fellowman.⁴⁴

1. Defamation of Clergymen

Before the Reformation, in the English common law the privilege of the clergy was almost absolute, and even later Coke pronounced from the bench that "to disturb a preacher is to disturb God."⁴⁵ Later the privilege of the clergy was narrowly construed in England, and in the 17th Century there was a hint

³⁹ *O. Moore v. Driscoll*, 135 Cal. App. 770, 28 P. 2d 438 (1933).

⁴⁰ 2 Cooley on Torts, § 237, p. 221 (4th ed., 1932); *Ecuyer v. N. Y. Life*, 101 Wash. 247, 172 P. 359, 363 (1918).

⁴¹ *Morache v. Broche*, 151 Mass. 567, 25 N. E. 74 (1890).

⁴² *Chaddock v. Briggs*, 13 Mass. 248 (1816).

⁴³ *Hayner v. Truman*, 27 Ohio St. 292 (1875).

⁴⁴ *Ibid.*, at p. 295.

⁴⁵ *Greswick v. Rooksby*, 2 Bulst. 47, 53.

that its privileges were non-existent.⁴⁶ In the 18th and early in the 19th Century it was clearly denied that such privilege ever existed.⁴⁷ In the United States the "touching of the profession" test was used by courts in deciding whether or not a clergyman could be defamed with impunity. The Ohio Supreme Court ruled that a charge of drunkenness is not per se actionable. It could be made actionable per se, in the case of a clergyman, only if it were spoken in reference to the performance of his ministerial duties.⁴⁸ A libelous message sent to a minister, saying: "you are a liar," and published later by a newspaper, was libelous per se.⁴⁹ It is actionable without proof of damage to say of a clergyman that he is the subject of scandalous rumors.⁵⁰ When an editorial called a minister unmannerly, discourteous and ignorant, the North Carolina Supreme Court held the statement to be libelous per se. The court found that the editorial exposed the clergyman to contempt, hatred, scorn or ridicule, and that the article was calculated to injure him in his office, profession or trade.⁵¹ Though ordinarily a charge of immorality not amounting to an indictable crime is not actionable per se, there is an exception in the case of a clergyman. Ministers of the gospel being teachers and exemplars of moral and Christian duty, pure and unspotted moral character is absolutely necessary to their usefulness. Their whole lives, and not merely the hours engaged in the pulpit, are watched and closely scrutinized.⁵² Even if some words touching a clergyman are actionable per se, which would not be so if spoken of others, it does not follow that all words which tend to bring a clergyman into disrepute, or which merely impute that he had done something wrong, are actionable without proof of special damage. The imputation, therefore, must be such that, if true, it would tend to prove him unfit to continue his calling, therefore leading more or less directly to proceedings by the proper authorities to silence him.⁵³ If a clergyman is assaulted in the pulpit, this is but an assault, though the time and the place may aggravate the wrong.⁵⁴ Certain statements have different meaning at different times. Since 1949, under *Remington v. Bentley*, the statement that a clergyman is a communist would be actionable.⁵⁵

⁴⁶ Anon. (1694) Skin. 404.

⁴⁷ Peake, A Compendium of the Law of Evidence, 128 (1801).

⁴⁸ Lawson, The Slander of a Person in His Calling, 15 Am. L. R. 573 (1881).

⁴⁹ Munson v. Latrop, 96 Wisc. 386, 71 N. W. 596 (1897).

⁵⁰ Cobbs v. Chicago Defender, 308 Ill. App. 55, 31 N. W. 2d 323 (1941).

⁵¹ Pentuff v. Park, 194 N. C. 146, 138 S. E. 616 (1927).

⁵² 3 Lawson, Rights, Remedies and Practice § 1255.

⁵³ 4 Newell, Slander and Libel, § 144, p. 176.

⁵⁴ 2 Cooley on Torts, 221-222 (4th ed. 1932).

⁵⁵ Remington v. Bentley, 88 F. Supp. 166 (S. D., N. Y. 1949).

2. The Privilege of Nondisclosure

The privilege of nondisclosure was not extended to ministers by the common law in England. The English law, as recited by *Regina v. Hay*, declares that the clergyman has no privilege to refuse confessional information.⁵⁶ American courts, especially since 1846, manifested reluctance to enforce the common law rule.⁵⁷ In 1923 the Minnesota legislature, among other state legislatures, changed the common law rule.⁵⁸ A clergyman, today,

shall not without the consent of the party making the confession, be allowed to disclose a confession made to him in his professional character in the course of discipline enjoined by the rules or practice of the religious body to which he belongs.⁵⁹

The Michigan Supreme Court ruled that this privilege is not extended to Roman Catholic priests alone, but to all who may stand as spiritual representatives of their churches.⁶⁰

To be privileged, the communication must be made to the clergyman as such, and by a person seeking religious or spiritual advice, aid or comfort. The fundamental thought is that one may safely consult his spiritual adviser.⁶¹ The Michigan Supreme Court declares that, by statutes and for reason of public policy, the clergyman and doctor should have the same privilege as the lawyer in common law.⁶² Earlier Michigan decisions apply the same rule, saying that statements made to a minister in his ministerial office are privileged.⁶³ The reason of his privilege is stated by the Iowa Supreme Court, thus:

. . . the human being does sometimes have need of a place of penitence and confession and spiritual discipline. When any person enters that sacred chamber, this statute closes the door upon him, and civic authority turns away its ear.⁶⁴

A bishop's charge to his clergy is privileged.⁶⁵

3. Exemptions of the Clergy

The state has recognized, without expressly so stating, that many of its functions are at best non-religious and at worst downright sinful in the eyes of high religion. Unwilling to re-

⁵⁶ *Regina v. Hay*, 2 F. & F. 4, 175 Engl. Rep. 933 (N. P. 1860).

⁵⁷ *In re Swanson*, 183 Minn. 602, 237 N. W. 589, 590 (1931); Prosser, *Law of Torts*, 534 (2d ed., 1955); *E. Barron Estate Co. v. Woodroff*, 163 Cal. 561, 126 P. 351 (1912).

⁵⁸ Minn. Gen. Stat. § 98 subd. 3 (1923).

⁵⁹ *Ibid.*

⁶⁰ *In re Swanson*, *supra* n. 57, p. 590.

⁶¹ *Ibid.*; Cooley, *op. cit. supra* n. 54, vol. 1, p. 554.

⁶² *In re Swanson supra* n. 57, p. 591.

⁶³ *Vickers v. Stoneman*, 73 Mich. 419, 41 N. W. 495, 496 (1889).

⁶⁴ *Reutkemeier v. Nolte*, 179 Iowa 342, 161 N. W. 290, 293 (1917).

⁶⁵ *Laughton v. Bishop of Sodor*, L. R. 4 Priv. Council, 495 S. C. 4 Moak 162.

lease the average religious citizen from his temporal obligations merely because of this tacit admission, the state seemed to concede to the clergy a special position in certain cases.

Exemptions from jury duty. The states exempt the clergy from the duty to serve as jurors. The reason for this exemption seems to be two-fold: (1) The minister is a confidant, with the privilege against testifying, especially when he is given the privilege of non-disclosure. (2) The minister cannot be forced to judge people.⁶⁶ The state statutes granting ministers this exemption, however, usually do not explain this rule.⁶⁷

Exemption from oath. Members of the clergy are exempted from taking an oath, and in some states the oath can be refused on religious grounds by other witnesses also. In *Moore v. United States* the Supreme Court ruled that the word "solemnly" was not required if affirmation was made by a witness.⁶⁸ In 1870 Illinois, among other states, provided in its constitution that either oath or affirmation would suffice.

Exemption from military service. Members of the clergy are exempt from military service.⁶⁹ This exemption is granted upon sufficient evidence that the exempt person is a member of the clergy. The United States Supreme Court ruled that draft boards could employ a theological panel to advise the board whether a person is a member of the clergy.⁷⁰ In another leading case the lower courts looked into the religious education of a conscientious objector before it was held that he was a minister. The case was certified to the United States Supreme Court, which gave recognition to exemptions claimed on religious grounds.⁷¹

Liabilities of Churches and Ministers

It has been said that no charitable immunity exists anywhere but in the United States.⁷² The immunity rule was taken over from England and was announced in 1876 and 1885.⁷³ American courts followed the English decision, not recognizing that the English rule was reversed even prior to the earliest American decisions. Through various decisions, four theories were developed—(1) trust fund, (2) waiver theory of beneficiaries, (3) exemption from respondeat superior, (4) public policy theory—by the courts in order to grant immunities to various

⁶⁶ Freeman, op. cit. *supra* n. 32, p. 453.

⁶⁷ Ohio Rev. Stat. § 2313.34.

⁶⁸ Moore v. United States, 348 U. S. 966 (1955).

⁶⁹ 62 Stat. 611, 50 U. S. C. § 456(g) (1948).

⁷⁰ Eagles v. United States, *supra* n. 28, at p. 316.

⁷¹ Gonzales v. United States, *supra* n. 30.

⁷² 25 A. L. R. 2d 29, 43.

⁷³ Feoffees of Heriot Hosp. v. Ross, 12 C&F 507.

charitable organizations but especially to churches.⁷⁴ The immunity rule became repulsive to an ever-increasing number of jurisdictions, and it was cautiously handled by many courts moving from immunity towards qualified immunities and distinguishing between ministerial and administrative activities of charities and churches.⁷⁵ Prior to 1942 only two or three jurisdictions rejected the immunity of charities outright.⁷⁶ In that year Judge Rutledge faced the problem squarely and ruled that charities should respond as do individuals, business corporations and others, when they do good in a wrong way. In his reasoning Rutledge demanded that liability insurance should be carried by charities in order to protect the injured and to eliminate "protected negligence."⁷⁷ In 1946 the United States, in the Federal Tort Claims Act,⁷⁸ waived its immunity from liability in tort for the negligent or wrongful acts or omissions of federal employees within the scope of their employment. The Rutledge decision was followed by a flood of court decisions discarding or criticizing charitable immunities. The courts, and authors of law books and articles demanding the abolishment of these immunities, were strengthened by the Federal Tort Claims Act in their general attack against negligent charities and churches. Yet charitable immunity still survives in the majority of the states. So far 18 states have rejected it, while the others are divided, either maintaining the complete immunity rule or restricting it to churches or to beneficiaries of charities.⁷⁹ Since the doctrine of charitable immunities is mainly court-made law, it is to be expected that it will be discarded by the courts of even more "immunity states." This trend is clearly indicated by dissenting opinions of judges in the immunity states:

The immunity of charitable institutions from liability for negligence of their employees is court made law, based upon erroneous, illogical and indefensible principles.⁸⁰

⁷⁴ Oleck, *Non-Profit Corporations and Associations*, 110 (1956); *Restatement of Torts*, Ch. 45, § 887; *Avellone v. St. John's Hospital*, 165 Ohio St. 467, 135 N. E. 2d 410 (1956); *Bond v. Pittsburgh*, 368 Pa. 440, 84 A. 2d 328, 331 (1951); *Bruce v. Y. M. C. A.*, 51 Nev. 372, 277 P. 798, 802 (1929).

⁷⁵ *Davis v. Central Congreg. Society*, 129 Mass. 367 (1880); *Bruce v. Central Methodist Church*, 147 Mich. 230, 110 N. W. 951 (1907); *Downes v. Harper Hosp.*, 101 Mich. 555, 60 N. W. 42 (1894); *Bianchi v. South Park Presb. Church*, 123 N. J. L. 325, 8 A. 2d 567 (1939); *Lyon v. Tumwater Evang. Free Church*, 47 Wash. 2d 202, 287 P. 2d 128 (1955); *Roberts v. Ohio Valley General Hosp.*, 98 W. Va. 476, 127 S. E. 318 (1925).

⁷⁶ Prosser, *op. cit. supra* n. 57, p. 787.

⁷⁷ *President and Directors of Georgetown College v. Hughes*, 76 App. D. C. 123, 130 F. 2d 810 (App. D. C. 1942).

⁷⁸ *Fed. Tort Claims Act*, 28 U. S. C. A. §§ 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680. (1952 Supp.)

⁷⁹ Prosser, *op. cit. supra* n. 57, p. 787; Note, 5 *Cath. Univ. of Amer. L. R.* 101 (1955).

⁸⁰ *Knecht v. St. Mary's Hospital*, 392 Pa. 75, 140 A. 2d 30, 40 (1958); *Annual Survey of American Law*, 489 (1958); *Landpaver v. Emmanuel Lutheran*

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The immunity of charities is clearly in full retreat, and the end of another decade probably will find the majority of the jurisdictions holding that it does not exist.⁸¹

The church immunity doctrine protects religious corporations but does not affect the ecclesiastical functions of the church. Therefore its retreat or abolition will not directly affect the spiritual leaders of the church. Ministers, as spiritual leaders, will still be protected in their ecclesiastical functions by other rules of the law, and their liabilities as officers of their corporations are only incidental to their offices.⁸² Those jurisdictions which have discarded church immunity are careful to stress that judgments against churches for the negligence of clergymen are rendered not against the spiritual church or its leaders but against a negligent religious corporation or a negligent corporate officer.⁸³

1. Freedom of Religious Opinions and Defamatory Publications

The right of freedom of speech touches the very heart of religious liberty, and the American churches jealously guard this freedom from any state interference. The General Assembly of the Southern Presbyterian Church is in line with other major denominations in declaring that a minister is called and set apart, under God, to proclaim the whole counsel of God. The assembly in this resolution reminds ministers that God alone is the Lord of conscience, and that no session or congregation can tell an ordained minister how he shall interpret the message of salvation and its application to life.⁸⁴ The constitutional guarantees of freedom of speech enable the minister to take a stand publicly in many controversial issues. He is assured by the United States Supreme Court that any censorship of religious opinion lies open to constitutional attack.⁸⁵ The right of free speech, however, is not absolute, and there is a line at which

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Bld., 203 Ore. 489, 280 P. 2d 301 (1955); *McDermott v. St. Mary Hosp. Corp.*, 144 Conn. 417, 133 A. 2d 608 (1957); *Annual Survey of American Law*, 396 (1957).

⁸¹ *Foster v. R. C. Diocese of Vermont*, 116 Vt. 124, 70 A. 2d 230 (1950); *Wilson v. Ev. Luth. Church of Reformation*, 202 Wis. 111, 230 N. W. 708 (1930); *Malloy v. Fong*, 37 Cal. 2d 356, 231 P. 2d 241 (1951); *Collopy v. Newark Eye and Ear Infirmary*, 27 N. J. 29, 141 A. 2d 276 (1958); *Lokar v. Church of the Sacred Heart*, 24 N. J. 549, 555 133 A. 2d 12 (1957).

⁸² *Dalton v. St. Luke's Cath. Church*, 27 N. J. 22, 141 A. 2d 273 (1958); *Rector v. Morgan*, *supra* n. 24; *Casey v. R. Cath. Archbishop*, *supra* n. 3.

⁸³ *Casey v. R. Cath. Archbishop*, *supra* n. 3.

⁸⁴ *Minutes of the 98th Gen. Assembly of the Presbyterian Church in U. S.* pp. 76-78 (1958); *Murray, The Role of the Churches (II)*, 34 *Notre Dame Law.* 630, 639 (1959).

⁸⁵ *Kedroff v. St. Nicholas Cathedral*, 344 U. S. 94, 121 (1952); *Konvitz, Bill of Rights Reader, Leading Constitutional Cases* (1954); *Pfeffer*, *op. cit. supra* n. 35; *Watson v. Jones*, 13 Wall. (U. S.) 679 (1872).

permissible curtailment begins.⁸⁶ This line of demarcation fluctuates, and even the Supreme Court has abstained from attempting a precise definition. The nearest approach to a concrete test appears in the precedent-making statement of Justice Holmes that actionability depends on whether:

the words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.⁸⁷

The "clear and present danger" test may be applied to statements which raise constitutional questions, but

there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problems. These include the lewd, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of peace.⁸⁸

The pulpit is not absolutely privileged and the clergy may be made liable for creating a clear and present danger or for making statements prohibited by the law. This liability of the clergy, and its qualified privilege, are well defined, especially in the second category. Defamatory communications, if prompted by a duty to the public or a third person, or made in good faith and without malice, touching a matter in which the party making them has an interest to another having a corresponding interest, are qualifiedly privileged.⁸⁹ In other words, the law recognizes qualified privilege in the clergy also, when the publication protects important interests of the publisher, is made to protect or advance the interest of the recipient, is a communication between those having a common interest for the protection or advancement of that interest, or when publication is made to proper persons in the interest of the public or is a "fair" comment of public interest or concern.⁹⁰ It was held that where the publisher and recipient have a common interest, in some circumstances there is a moral obligation to speak. This moral obligation of churches and ministers is recognized by the law.⁹¹ The privilege is forfeited if the clergyman steps outside of the scope of the privilege or if the publication is prompted by ill will.⁹²

⁸⁶ Note, *Freedom of Speech, etc.*, 24 St. John's L. R. 83, 85 (1949).

⁸⁷ *Schenck v. United States*, 47 U. S. 52 (1919).

⁸⁸ *Chaplansky v. New Hampshire*, 315 U. S. 568 (1942).

⁸⁹ *Ecuyer v. N. Y. Life Ins. Co.*, *supra* n. 40.

⁹⁰ *Prosser*, op. cit. *supra* n. 57, p. 606.

⁹¹ *Slocinski v. Radwan*, 83 N. H. 501, 144 A. 787 (1929); *Creswell v. Pruitt*, 239 S. W. 2d 165 (Tex. Civ. App., 1951); *Pinn v. Lawson*, 63 App. D. C. 370, 72 F. 2d 742 (D. C. C. App., 1934).

⁹² *Brewer v. Second Baptist Church of L. A.*, 32 Cal. 2d 791, 197 P. 2d 713 (1948).

If the minister is privileged to make publications, or if he is protected by the constitution, the law protects him against third parties also. (1) He is protected against state laws and statutes which deprive clergymen and other citizens of the constitutional right of free speech.⁹³ (2) The constitution protects him against the government, since the clergyman, as any individual citizen, in discharging his public duties is privileged when he acts in his public capacity.⁹⁴ (3) He is protected against his congregation, as to privileged publications or when his constitutional rights to free speech would be impaired by the congregation.⁹⁵ This protection has gained momentum since the American clergy began taking a firm stand to further desegregation, often against state regulations and practices of local congregations.

The qualified privilege of the clergy does not exist when the publication is defamatory per se. The words of a priest from a pulpit were held to be actionable per se, where a medical doctor was touched in his profession. In this case the court reasoned:

The defendant priest assumed to stand in a position of authority. By virtue of this position he was able to exert a special influence upon his people.⁹⁶

The rule in other similar cases is the same. No privilege was given to a clergyman in making charges from the pulpit against members of his congregation in relation to their business.⁹⁷

2. Relational Torts and Liabilities

a. *Reliance on opinion of experts.* Pastoral counseling has become one of the most important functions of clergymen. Special courses are offered by seminaries to train future clergymen in this field. The church denominations strive to make experts of them in this field. This is evidenced by various scientifically developed methods and materials used by the denominations. The counseling of a pastor, who is presumed to be an expert, with his parishioner, establishes a close and confidential relation. The law of torts recognizes that special circumstances, such as a confidential relation between the parties or disparity of knowledge, justify the reliance of plaintiffs even if the representation purports to be only an opinion. There is a growing unwillingness on the part of the courts to allow statements to be made without liability, when the statements are calculated to induce

⁹³ *Chicago v. Tribune Co.*, 307 Ill. 595, 139 N. E. 86, 90 (1923); 28 A. L. R. 1368; *Terminello v. Chicago*, 69 United States 894 (1949); Note: Limiting State Action by the 14th Amendment, 67 Harv. L. Rev. 1016 (1954).

⁹⁴ *Chicago v. Tribune Co.*, *supra* n. 93, p. 90.

⁹⁵ *O'Hara v. Stack*, 90 Pa. 477 (1879); *Nunnery v. Bailey*, 65 Okla. 260, 166 P. 82, 83 (1917).

⁹⁶ *Morasse v. Brocher*, 151 Mass. 567, 25 N. E. 74, 78 (1890).

⁹⁷ *Fitzgerald v. Robinson*, 112 Mass. 371 (1873).

and do induce action or inaction on the part of the hearer.⁹⁸ No clergyman seems to have been involved in litigation on this point, but in many other cases, where the parties stood in a relation of trust and confidence, it was held that reliance upon expert opinion was justifiable.⁹⁹

b. *Interference with family relation.* Since clergymen are vitally interested in furthering religious family life, ministers of all faiths devote considerable time and effort to counsel with members of families. Yet, the interest of undisturbed relations among members of the family is recognized by public policy also, and the tendency is to allow recovery for its disturbance. The gist of the tort is an interference with a mental attitude of the family members, especially towards husband or parents. The tort must be an intentional one, directed at the relation itself.¹⁰⁰

Church and state are tacitly in accord with respect to interference with family relations. There are cases, however, such as those in families of mixed religious backgrounds, where a minister may be accused of tortious interference. The most important defense is that of privilege. The interest of parents in advising their children, even after marriage, is recognized by a privilege where it is done to advance the child's welfare. When the purpose of the defendant is something else than the benefit of the recipient of the advice, the privilege is forfeited. A stranger has no general privilege of interference, but there may be relations of professional character which justify acts tending to disrupt the marriage or the family relation.¹⁰¹

c. *Interference with contract to marry.* The courts are generally reluctant to hold that it is an actionable tort to induce the parties to break a contract to marry. Society does not favor hasty and ill-conceived marriages.¹⁰² Honest advice given by friends, relatives, or by a spiritual advisor is privileged. No law suit is known to text writers where a higher court made a ruling against a minister for his advice to breach a contract to marry.¹⁰³

d. *Interference with other contractual relations and with prospective advantage.* The law protects a person in his interference in this field if his impersonal and disinterested motive was of a laudable character.¹⁰⁴ The minister, like other persons who strive to protect the public interest, may receive protection in

⁹⁸ Prosser, op. cit. *supra* n. 57, p. 561.

⁹⁹ *Rice v. Press*, 117 Vt. 442, 94 A. 2d 397 (1953); *Spiess v. Brandt*, 230 Minn. 246, 41 N. W. 2d 561 (1950).

¹⁰⁰ Prosser, op. cit. *supra* n. 57.

¹⁰¹ *Modisett v. McPike*, 74 Mo. 636 (1881); *Jennings v. Cooper*, 230 S. W. 325 (Mo. App., 1921); Restatement of Torts, § 686, Comment d.

¹⁰² *Carpenter*, *Interference with Contract Relations*, 41 Harv. L. R. 728, 751 (1928); *Lukas v. Tarpilauskas*, 266 Mass. 498, 165 N. E. 513 (1929); *Minsky v. Satenstein*, 6 N. J. Misc. 978, 143 A. 512 (1928).

¹⁰³ Prosser, op. cit. *supra* n. 57, p. 727.

¹⁰⁴ *Kruyer Publ. Co. v. Messmer*, 162 Wis. 565, 156 N. W. 948 (1916); *Ann. Cas.* 778 (1918 C).

his interference with contractual relations and especially with prospective advantages.¹⁰⁵

The proselytizing activities of ministers may not be considered as such an interference with advantageous relations of other churches as to justify civil courts' taking of jurisdiction. The constitutional freedom of religion would prevent any church body from bringing action against other churches or their ministers for inducing people to change religion or church. The proselytizing activities of the minister, however, may not be carried out with actually tortious intent with impunity.

If a schism is effected by ministers within the denomination, the law is not concerned with the split of the church but only with property or civil rights.¹⁰⁶

VI. Probable Future Developments

The fast-growth of American churches, the economic strength of the denominations, the development of tort law, and especially the stands of the clergy in many hotly debated public issues—such as the questions of segregation, peace, gambling, and others—soon may raise many as yet unprecedented questions which may bring cases of first impression into the courtroom.

The attitudes of the American Protestant and other churches towards church unions may throw into the lap of the courts renewed demands to help the church unions by changing the court-made law with respect to property rights.

It is to be expected, therefore, that church-related questions will be more and more diversified in the courts for some time to come.

¹⁰⁵ *Brimelow v. Casson*, 1 Ch. 302 (1924).

¹⁰⁶ *Kedroff v. St. Nicholas Cathedral*, *supra* n. 85; *Watson v. Jones*, *supra* n. 85; *Romanian Orthodox Missionary Episcopate v. Trutza*, 120 F. Supp. 183 (N. D. Ohio 1952).